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25842—25——1

In the Supreme Court of the United States

WILLIAM NAHMEH, APPELLANT,
v.
THE UNITED STATES OF AMERICA,
appellee

No. 157

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

I

STATEMENT OF FACTS

The S. S. *Quinnipiac,* owned by the United States, at the time of the accident to Nahmeh—fireman—was under bareboat charter to the United States Transport Company, Inc. Had the vessel been privately owned, a libel *in personam* against her owner could not have been maintained in any district as liability *in personam* only could be asserted against the bareboat charterer. A libel *in rem* could have been maintained against the vessel only in the district where the vessel physically was at the time the libel was filed. Had the vessel then been operated by her private owner instead of under the bareboat charter, a

libel *in personam* could have been maintained in the District where the owner resided or had his principal place of business or where the vessel physically was through foreign attachment proceedings, or a libel *in rem* could have been maintained in the District where the vessel physically was at the time of the filing of the libel.

The record of proceedings in the District Court is rather informal and is reviewed. The libel (for personal injuries) filed under authority of the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525) declares ownership and operation of the vessel by the United States and that the injuries were due " to the negligence of the respondent (United States) and the officers and seamen in command of said vessel." (R. p. 4.) The libelant is said to " resides within the Eastern District of New York." (R. p. 3.) There is no statement or election that the libel is to proceed either upon principles of *in rem* or *in personam* liability.

The accident occured August 3, 1920, and the libel was filed March 30, 1922. On December 9, 1922, by motion and supporting affidavit, libelant suggested (R. p. 15) that as at the time of the injuries the *Quinnipiac* was operated by the United States Transport Company under a bare-boat charter and as under a recent decision of the United States Circuit Court of Appeals for the Second Circuit (the *Isonomia,* 285 Fed. 516), the only district in which suit could be brought was the Southern District of New York, where the

vessel physically was, the District Court for the Eastern District was without jurisdiction. It asked for a transfer of the cause from the Eastern District to the Southern District. On December 16, 1922, appearing specially, the Government filed exceptions to the jurisdiction of the court upon the doctrine announced in the *Isonomia* case, that as liability for the injuries only could be asserted upon principles of *in rem* liability (there being no *in personam* liability) suit could only be maintained in the District where the vessel physically was at the time the libel was filed (R. pp. 8, 9). The libelant was without authority to file his libel (*in rem*) in the Eastern District as he did.

On January 5, 1923, the court dismissed the libel under authority of the *Isonomia case* and denied its authority to transfer the action to the Southern District. Final decree was then entered dismissing the libel for want of jurisdiction. (R. pp. 11, 12.) From the decree so entered the appeal is taken to this court.

II

QUESTION PRESENTED

The sole question of jurisdiction is whether a libel filed under the authority of the suits in Admiralty Act, which proceeds upon *in rem* principles only, must be filed in the District where the vessel is at the time of the filing of the libel.

III

THE ISONOMIA CASE

(285 Fed. 516)

We review the *Isonomia* case, upon authority of which the District Court dismissed the libel. The Circuit Court of Appeals for the Second Circuit affirmed the District Court (Southern District of New York) which dismissed the libel of the Cunard Steamship Co., Ltd., against the United States for want of jurisdiction. The facts were substantially the same as in the instant case and the jurisdictional question raised was identical. The libelant had its principal office in the District, the vessel charged with liability was without the District, and liability existed solely upon principles of *in rem* liability. Had the vessel been privately owned no action *in personam* could have been maintained against her owner, because the vessel, at the time of the services had been bare boat chartered to others. Proceedings *in rem* could have been maintained only in the District where the vessel physically was when the libel was filed. For the convenience of the court we excerpt the opinion (Rogers C. J.):

> On September 7, 1916, Congress passed the act creating the United States Shipping Board. Section 9 of that act provided as follows:
>
> "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only

under such registry or enrollment and license. Such vessels, while employed solely as merchant vessels, shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (7 U. S. Comp. St. Par. 8146e, p. 8651.)

The act of 1916 came before the Supreme Court in *The Lake Monroe,* 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962. * * * The Supreme Court held that, because of the act of 1916, in spite of her ownership by the United States, the vessel was subject to the same arrest as any vesesl privately owned.

The arrest and seizure of government-owned merchant vessels was regarded as detrimental to the public interest. While it was recognized as proper that the United States should permit suits to be brought in admiralty against the government, it was deemed wise to restore the immunity of such vessels from seizure which had been taken away by the Shipping Act of 1916. As respects government vessels of war, or those employed in the revenue service of the government, they were always exempt from seizure; their immunity from arrest not having been taken away by the act of 1916. The consequence was that in 1920 Congress passed the Suits in Admiralty Act, which provided that no vessel owned by the United States should be subject to

arrest or seizure by judicial process. (41 Stat. 525.) In other words, it restored the immunity from seizure which merchant vessels owned by the government possessed prior to the act of 1916, and it declared that a suit in personam in admiralty might be brought against the United States in a case where, if the vessel had been privately owned or operated, a proceeding in admiralty could be maintained at the time of the commencement of the action. Then the act went on to provide, as already set forth, that such suits shall be brought in the District Court " for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." (Section 2.)

This is the act upon which the libelant's right to maintain this suit depends, and the meaning of that act we are now called upon to determine. Section 1 of the act provides:

"That no vessel owned by the United States * * * shall hereafter, in view of the provision herein made, for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions. * * *."

And Section 2 provides:

"That in cases where, if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of

the action herein provided for, a libel in personam may be brought against the United States, * * * provided that such vessel is employed as a merchant vessel. * * * Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

(2) In interpreting the act, permitting as it does a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent; and if Congress in certain cases gives its consent, the courts are confined to the letter of the statute which expresses such consent. *Schillinger* v. *United States,* 155 U. S. 163, 166; 15 Sup. Ct. 85; 39 L. Ed. 108. And all the provisions of such a statute are jurisdictional. As the liability and the remedy are created by the statute, the limitations of the remedy are regarded as limitations of the right. *The Harrisburg,* 119 U. S. 214; 7 Sup. Ct. 140; 30 L. Ed. 358.

(3) Congress has the power not only to say in what kind of cases the United States may be sued, but in what court the suit may be brought. There are two kinds of suits in admiralty; one being a suit in personam, the other a suit in rem. One is a suit against a person and the other against

the vessel. In many cases the libelant may sue either in rem, against the vessel, or in personam, against the owner, as he prefers. Thus, in cases of collision, the ship may be sued in rem, as the offending thing which caused the injury, or the libelant may elect to sue the owners in personam because of the negligence of those in charge. And similarly in cases of cargo damage the suit may be in rem, against the ship, or in personam, against her owners, either for their negligence, or for breach of the contract safely to carry. And there are cases in which there may be a joinder of proceedings in rem and in personam. See Benedict's Admiralty (4th Ed.) Par. 294. Admiralty rule 13 declares that:

"In all suits for mariners wages or by material men for supplies or repairs or other necessaries, the libelant may proceed in rem against the ship and freight and/or in personam against any party liable."

And rule 14 declares that:

"In all suits for pilotage or damage by collision the libelant may proceed in rem against the ship and/or in personam against the master and/or the owner."

It is necessary, in construing the act of 1920, to keep in mind the above principles. These rules were promulgated on March 7, 1921, and the Suits in Admiralty Act, as already stated, was adopted on March 9, 1920, or a year prior. However, prior to the adoption of these new rules the old ad-

miralty rules 12 to 20 (267 Fed. x–xi) had allowed in certain cases, as was held in the *Corsair,* 145 U. S. 335; 12 Sup. Ct. 949; 36 L. Ed. 727, a joinder of ship and freight, or ship and master, or alternative actions against ship, master, or owner alone; but in no case within those rules could ship and owner be joined in the same libel. The Supreme Court in the *Corsair* case had expressly left the question open as to whether ship and owner could be joined in the same libel in cases not falling within those rules. But other courts had expressly held in favor of joinder in such cases, and in Benedict's Admiralty, Par. 294, that distinguished authority had declared that the advantage of such right was so obvious and the objections thereto so technical that there could be little doubt that the practice would be upheld, if the question was ever presented to the highest court.

(4) In the light of the rules of procedure referred to, it seems obvious to us why Congress adopted the venue clause found in section 2 of the act of 1920. In cases in which the libelant has an alternative remedy, he may avail himself of the alternative venue. The possible alternative venue relates, and relates only, to cases in which there is an alternative remedy. In other words, if there is a liability of a vessel and a concurrent liability of the owner, the libelant may, under section 2 of the act of 1920, sue where he has his principal place

of business or where he finds the vessel. As the United States may be said to be domiciled everywhere within their territory, the rule so construed is exactly the same as between private parties in a suit against the owners of a vessel. The United States being everywhere within their territory, the libelant may sue in personam in the district where he resides and obtain jurisdiction of the respondent, or he may sue in rem where he finds the vessel without concerning himself with the whereabouts of the owner. But where there exists solely the liability of the vessel and no liability of the owner, the libelant must sue under the act of 1920, as prior to the act, only in the district in which he finds the vessel.

We arrive at that conclusion, as we are convinced that the purpose of the act was to place the United States on exactly the same footing as a private party. That this was the intent appears from the language of section 2, declaring "that in cases where, if such vessel were privately owned or operated," a proceeding in admiralty could be maintained "at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States," provided the vessel was employed as a merchant vessel, etc. We understand this to mean, that, where no right of action would exist between private parties, none would exist against the United States; and in the instant case it is admitted that, had the

Isonomia been privately owned, instead of by the United States, no suit against her, on the cause of action alleged in the libel, would lie, except in the district where she was found.

The general language of the provision as to venue found in section 2, as of every part of the act of 1920, must be read in the light of the legislative intent so far as that intent is clearly expressed. Read in the light of that intent, we construe the provision giving permission to sue wherever libelant lives or has its principal place of business relates to those cases in which the proceeding is one which in its origin is essentially in personam, and that it does not extend to cases in which the proceeding is one which in its origin is essentially in rem, but in which the United States is made by virtue of the act suable in personam. In such a case the right to sue must, in our opinion, under the Suits in Admiralty Act, be pursued as in the case of a private individual in the district where the res is found. We find no reason to suppose that Congress intended to make the United States suable under any circumstances in which a suit could not have been instituted if the ship had been privately owned. It is difficult to believe that Congress intended in the venue provision of section 2 to confer upon one suing for a wrong committed by a publicly owned ship a choice of jurisdiction which he would not possess in case the wrong was committed by a privately owned ship.

IV

THE SUITS IN ADMIRALTY ACT

The pertinent provisions of the suits in admiralty act, March 9, 1920 (41 Stat. 525), by authority of which the libel is filed, may be thus paraphrased:

> Be it enacted * * * that *no vessel owned by* the United States * * * shall hereafter in view of the provisions herein made for a libel in personam *be subject to arrest or seizure by judicial process in the United States or its possessions.*
>
> SEC. 2. That in case where if *such vessel were privately owned* or operated * * * *a proceeding in admiralty could be maintained at the time of the commencement of the action* herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel be employed as a merchant vessel * * *. Such suit shall be brought in the District Court of the United States for the district in which the parties so suing or any of them reside or have their principal place of business in the United States, *or in which the vessel or cargo charged with liability is found* * * *. In case the United States * * * shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed, *with the same force and effect* as if the libel had been *filed by a private party* * * *. Upon application

of either party the cause may, in the discretion of the court, be transferred to any other District Court of the United States.

SEC. 3. *That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.* • • • Decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. *If the libellant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained.* Election to so proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit. • • •

SEC. 6. That the United States • • • shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners • • • of vessels.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this act is arrested, attached, or otherwise seized by process of any court in any country other than the United States • • • the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States or any other officer duly authorized by him, may direct the United States consul residing at or

> nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required for the release of such vessel or cargo and for the prosecution of any appeal. * * * : *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

V

HISTORY OF THE LEGISLATION

The scope of the jurisdiction provided by the act has been seriously questioned. Its legislative history indicates that it must be measured by and limited to the liabilities considered by section 9 of the original Shipping Act. This Court has so construed the Act. Section 3 of the act provides—

> that such suits shall be heard and determined according to the principles of law and to the *rules of practice obtaining in like cases between private parties.* (Italics ours.)

It also definitely requires the libelant to elect in his libel to proceed in accordance with the principles of libels *in rem*, wherever it shall appear that had the vessel been privately owned or possessed a

libel *in rem* might have been maintained. Election to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

> If the libelant so elects in his libel the suit may proceed in accordance with principles of libel *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election to so proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

It is undisputed that if the *Quinnipiac* had been privately owned at the time of the accident (she was bareboat chartered to third persons) a libel could have been maintained only in the District where the vessel was when the libel was filed. No proceedings *in personam* could have been brought against her owners. If the *Quinnipiac* then had been operated by her private owners, there would have been concurrent remedies—the right to file a libel *in personam* against such owners in the District where they resided or had their principal place of business, or the right to file the libel *in rem* in the District where the vessel physically was. Section 3 further requires that any action brought by authority of the act shall proceed and be heard and determined according to principles of law and rules of practice obtaining in like cases between private parties. It retains the distinc-

tions between libels upon principles of *in rem* liabilities and libels upon principles of *in personam* liabilities and requires an election to proceed *in rem* in causes where the liability is solely an *in rem* liability of the vessel and there is no concurrent *in personam* liability of the owner. This confirms the views of the *Isonomia* case (supra).

We now refer to the venue provisions of Section 2 of the act.

The original draft of the act as prepared, by its wording provided for both an *in rem* and an *in personam* liability, and the venue clause (in the alternative) intended to apply (a) residence or business or District nearest where the cause of action arose—to *in personam* liabilities, and (b) District in which vessel was—to *in rem* liabilities. For comparison, we place in parallel columns the material provisions of Sections 1 and 2 of the original draft and of Sections 1, 2, and 3 of the act as passed:

THE ORIGINAL DRAFT	THE ACT AS PASSED
1. That the United States, * * * may be sued in personam in the District Courts of the United States in Admiralty for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States * * * of any merchant vessel. * * * In those cases where, if	1. That no vessel owned by the United States * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions * * *.
	2. That in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement

the United States were suable as a private party, a suit in personam could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of the suit.

Any such suit shall be brought in the District Court of the United States for the District in which the parties so suing, or any of them, reside, or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, or in the district in or nearest which the cause of action arises.

2. *That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.* • • • Decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. *If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained.* Election to so proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit.

[Italics ours.]

of the action herein provided for, a libel in personam may be brought against the United States • • • provided that such vessel is employed as a merchant vessel. Such suits shall be brought in the District Court of the United States for the District in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.

3. The same as section 2 in the original act.

The venue provisions (Sec. 1) of the original draft is consistent with the scope of the jurisdiction there provided which included the right to

proceed upon principles of *in personam* liability as well as upon principles of *in rem* liability. These venue provisions, substantially, are declaratory of the admiralty law and practices as it exists between private parties. The libel upon principles of *in personam* liability could be filed in the District where the libelant resided or had his principal place of business, or, in case of foreign claimants, in the District in or nearest which the cause of action arose. However, the libel upon principles of *in rem* liability could only be presented in the District where the vessel was at the time of the filing of the libel. What Congress did was to strike out the wording of the section relating to suits *in personam,* " in those cases if the United States were suable as a private party, a suit *in personam* could be maintained " and left in the wording relating to the liability of the vessel owned by the United States and employed as a merchant vessel. (Sec. 9 Shipping Act of 1916.) It allowed ~~section 2 (Sec. 3 of the act as passed) to remain as~~ the alternative venue provisions of section 1, to remain ,and section 2 became section 3 of the act as passed.

We have carefully examined the hearings before committees and their reports, and the discussions in Congress, and we do not find any satisfactory explanation and reason for this action. These

legislative proceedings[1] do indicate that the bill was not "to add to the liability of the Government but to prevent the seizure and detention of our (Government merchant) ships." (Congressional Record, Vol. 59, pp. 1678–1693, 1750–1759, 1773.) The acts (by their terms) and all discussions in-

[1] The legislative history of the suits in admiralty act is summarized: The original bill, known as S. 2253, was introduced in the Senate on June 23, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec., p. 5869). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec., 7538). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec., p. 6017). This bill was debated in the Senate (Cong. Rec., pp. 7317, 7439, 7440), and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec., 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec., 66th Congress, 2nd sess., p. 498). This report was debated (Cong. Rec., pp. 1678–1693, 1750–1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec., p. 3350), and agreed to by the Senate (Cong. Rec., p. 3690, 3691). It was also submitted in the House as H. R. 669 (Cong. Rec., p. 3629), agreed to by the House (Cong. Rec., p. 3631), examined and signed (Cong. Rec., pp. 3864–3883), approved by the President March 9, 1920 (Cong. Rec., pp. 3864–3883), approved by the President March 9, 1920 (Cong. Rec., p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

tended that the practice as between private parties in the same class of litigation must prevail. Libels upon principles of *in rem* liability can be filed only in the District where the vessel physically is.

The rulings in the *Isonomia* case are consistent with these observations. While there has been differences of opinion among Government counsel, the larger number familiar with the administration of the act agree that the *Isonomia* rulings give to the act the practical application and scope which its provisions indicate and limit the substantive rights created as the legislative history of the act suggests was its purpose.

VI

ARGUMENT

We suggest the reasoning and rulings in the *Isonomia* case are sound, and we adopt them as our own. It has been followed in these cases:

The Eastern Mariner (D. C. S. D. N. Y., Ward, C. J.), 1924, A. M. C. 997.

The Wampum (D. C. E. D. of N. Y., Garvin, D. J.), 1923, A. M. C. 400.

Puget Sound Stevedoring Co. v. *United States* (W. D. of Wash., Neterer, D. J.), 1923, A. M. C. 381.

The Faraby (S. D. of N. Y., Goddard, D. J.), 1923, A. M. C. 468.

Blamberg Bros. v. *United States* (D. C. Md., Rose, C. J.), 272 Fed. 978.

Gefle Mfg. Aktiebolag v. *United States* (D. C. S. D. N. Y., Learned Hand, D. J.), 291 Fed. 927.

In *Puget Sound Stevedoring Co.* v. *United States* (*supra*), the court ruled (pp. 382–385):

> A party may have a remedy where a vessel is privately owned *in personam* or *in rem* or may have both remedies. It is clear from the Act, and if not, it is conclusively shown by the report of the committee in the Senate and in the House that the object of the Bill is not to add to the liability of the government but to prevent a seizure and detention of the government ships and therefore eliminate unnecessary loss, and that the sole purpose was that, if the vessel was privately owned the vessel could be seized *in rem*, that a *personam* action should lie against the United States to proceed in accordance with the principles of libel *in rem*, and that there was no purpose to extend the substantive rights of any claimant, but was merely a provision to effect the remedy; that being the purpose, to proceed in accordance with principles of libel *in rem* the conditions must all be present in a proceeding if the vessel was privately owned, and the presence of the vessel in the district in which the court's jurisdiction is invoked in such case is essential. Admr. Rules 22, Bene. par. 305. The jurisdiction of the court by the Act is limited to places where the libelants or some of them live or have their principal place of business, or where the vessel may be. This is a general provision and has relation to *personam* and *in rem* proceedings. The special provisions

with relation to proceedings *in rem* being limited to the status of privately owned vessels, and the court not having jurisdiction of a proceeding *in rem* where the vessel is privately owned, unless the vessel is within the district, the same condition must obtain where the vessel is owned by the United States, and a proceeding in accordance with principles of libel *in rem* must proceed where the vessel may be, and the vessel not being in the district this court has not jurisdiction. I think this is sustained by the Blamberg case (Supreme Court decision) *supra,* and so held in the *Cunard S. S. Co., Ltd.,* v. *U. S., owner of the Isonomia,* Court of Appeals of the 2nd Circuit, opinion by Judge Rogers, 1923, A. M. C. 132. * * *

An action *in rem* can not be maintained unless the *res* is within the jurisdiction of the court, Admr. Rules, 22, *supra,* Ben. Adm. 305 *supra,* and for purposes of libel *in rem* jurisdiction may not be stipulated by the Master, the vessel not being in the district, the *Hungaria,* 41 Fed. 109, and the United States can not be sued without its consent through statutory enactments, and courts may not go beyond the letter of such consent, and jurisdiction must be exercised subject to the restrictions imposed by the Congress. *Kawananahoa* v. *Polyblank,* 205 U. S. 349; *Schillinger* v. *U. S.,* 155 U. S. 163.

The act affecting the remedy in admiralty, of government owned vessels must be read according to the natural and obvious import

of the language without resorting to enforced construction for the purpose of extending its operation. *U. S.* v. *Temple,* 105 U. S. 97; *Moore* v. *U. S.,* 249 U. S. 487, and in harmony with the maintenance of the general policy of court procedure and where a right to sue is extended it would not be enlarged merely by the use of words general enough to include it where the purpose to maintain the general policy is apparent, *Reid* v. *U. S.,* 211 U. S. 529. This being a proceeding according to the principle of libel *in rem* and specific objection being made that the vessel is not within this district, and if the vessel were privately owned the proceeding could not be entertained, the exceptions must be sustained.

We do not read anything in these decisions to be in conflict with the theories of interpretation and jurisdiction which this court has applied in the cases where the act has received its consideration. *Blamberg Bros.* v. *United States,* 260 U. S. 452; *James Shewan & Sons., Inc.* v. *United States* (decided November 17, 1924), — U. S. —.

There are practical reasons for these rules. In many cases where the government has sold its vessels upon conditional terms or chartered them on bare-boat charter, liens in amounts beyond the value of the vessel have attached. There is no personal responsibility of the owner. It is necessary to surrender the vessel in proceedings upon *in rem* principles and secure her sale and

require all claims *in rem* to be presented against the proceeds under penalty of being barred. If the vessel is within the District where the libel *in rem* is filed, the proper surrender can be made and the marshaling of all *in rem* claims required according to the usual procedure and practice where the vessel is privately owned.

Libels *in rem* usually are filed promptly. If they must be presented in the District where the vessel then physically is, rather than in the District where the libelant resides, which can be filed at any time within two years at the convenience of counsel, the prompt filing is secured and the government has the opportunity of impleading foreign vessels then in port which have contributed to the loss. Otherwise, through collusion or design, there may be delay in filing the libel in the District of the residence of the libelant until after the opportunity for filing the impleading petition against the third vessel is lost.

Again, where the libel *in rem* is filed in the District where the vessel physically is, especially where the vessel is under bare-boat charter, there is the immediate opportunity to examine the witnesses at the time when otherwise the testimony of such witnesses may be lost forever. If the libel is filed in the District where the libelant resides, delays must follow and the opportunities which a private owner would have under like circumstances for investigation and examination are lost to the government.

In many instances the terms of the bareboat charter require the charterer to cover certain risks (P. & I. risks, which include personal injuries and cargo damage) with private underwriters. Such insurance contracts are between the charterer and the underwriter and are contracts of indemnity. When accidents happen the libelant usually knows this, presents no claim against the Government, or takes any active proceeding, but negotiates settlement with underwriters. In many instances, before settlement is concluded, the charterer becomes insolvent, and the underwriters decline to pay upon the theory that, as their contract is one of indemnity, there is no obligation on their part to do anything until after the insolvent charterer effects a settlement. This can not be accomplished. Suit is then brought against the Government in many instances in districts of the residence of the libelant, although the liabilities are solely *in rem* ones. If the venue clause is read to allow libels upon *in rem* principles to be presented only in the district where the vessel physically is, such libels must be filed promptly and the Government advised of the claim. Frequently satisfactory arrangements by special agreement can be made for the underwriter to assume the liability for the defense of the suit and to pay any decree entered, if the libel be actually filed in the district where the vessel is. This arrangement can not be accomplished after

the charterer has become insolvent. The Government should have the benefit of these opportunities, as it is just what private owners in like cases would have. Other practical and related factors may be suggested.

The appellant notices the opinion of three District Courts which have construed the venue provisions of Sec. 2 otherwise. *The Annie E. Morse* (S. D. of Ala., Ervin, J.), 287 Fed. 364; *Middleton & Co.* v. *United States* (E. D. of S. Car., Smith, J.), 273 Fed. 199; *Alsberg* v. *United States* (S. D. of N. Y., Mack, C. J.), 285 Fed. 573.

In *Middleton & Co.* v. *United States* (supra), the suit was based upon a bill of lading issued by the government which was operating the ship. Had the vessel been privately owned, an action *in personam* could have been maintained against her owners or an action *in rem* against the vessel. (The *Isonomia* case.) The libelant later did elect to proceed upon *in personam* principles as well as *in rem* principles. The District court reserved decision until the final hearing of the case.

Jurisdiction in these cases is assumed by the literal application of the alternative provisions of the venue provisions, without careful consideration of the related clauses which require the venue provisions to be read with the principles of law and rules of practice applicable to actions between private parties. They do not recognize that the Act does carefully distinguish between actions

upon principles of *in rem* liability and actions upon principles of *in personam* liability.

Points II and III made by the Appellant (Brief, pp. 12-16) were not raised in the court below.

By his affidavit the libelant admits that at the time of the accident "*the Quinnipiac was under bare boat charter and that there is no right in personam against the United States,*" and that "the cause of action set forth is one *in rem* against the Steamship Quinnipiac." (R. p. 15.) The affidavit further states (R. p. 15), "Therefore under a recent decision of the United States Circuit Court of Appeals for the Second Circuit (*Cunard S. S. Co.* v. *U. S. A.*, not yet reported), the only district in which suit can be brought is the district in which the vessel is found." These sworn admissions are inconsistent with the reasons now advanced. Under the *Iconomia* decision the libel could not have been maintained in the Eastern District of New York.

Neither by the pleadings nor the admitted facts does it appear that at the time of the filing of the libel or since the *Quinnipiac* was or has been within the jurisdiction of the Eastern District of New York. The duty is upon the libelant to plead such fact. The actual fact is that for more than a year previous to the filing of the libel and ever since the vessel has been tied up at Cornwall within the County of Orange, State of New York.

The affidavit of counsel (R. p. 15) states "that at the present time (December 9, 1922, libel having been filed March 30, 1922) the vessel was lying at Cornwall within the County of Orange, State of New York." By the exceptive allegations filed by the Government (R. p. 9) the vessel was tied up January 25, 1921, and ever since has been tied up. Such exceptions specifically deny that the vessel "at the time of the filing of the libel" was within the Eastern District of New York. As a fact the vessel was tied up in the Hudson River in Orange County, within the exclusive jurisdiction of the Southern District.

The appellant reasons (Brief, p. 13) that as the Eastern and Southern District have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, the vessel could be "found" in the Eastern District. The vessel at all times was tied up in the Hudson River within the County of Orange, a considerable distance above any of the counties named by Section 97 of the Judicial Code. The Eastern District never has had concurrent jurisdiction over the waters of Orange County. The vessel at the time of the filing of the libel and ever since has physically been without the jurisdiction of the Eastern District. This question was not raised in the District Court, and the matter was disposed of upon the sworn admission that under the *Iroquois* ruling the Eastern District

was without jurisdiction. In *in rem* proceedings, for the court to have jurisdiction under the *Isonomia* case, the libelant must affirmatively allege that the vessel was physically within the district at the time the libel was filed. (*The Isonomia*, p. —, *supra; The Harrisburg*, 119 U. S. 199, 214.)

VII

CONCLUSION

It is respectfully suggested the decree of the District Court should be affirmed.

Respectfully,

JAMES M. BECK,
Solicitor General.

J. FRANK STALEY,
Special Assistant to the Attorney General,
In Admiralty.

APPENDIX

PREVIOUS DECISIONS OF THIS COURT

In *Blumberg Brothers* v. *United States*, 260 U. S. 452, the narrow question presented was whether the second section of the Suits in Admiralty Act authorized a suit against the United States as a substitute for a libel *in rem* when the United States vessel was not in a port of the United States or one of her possessions. By the opinion, Mr. Chief Justice Taft said (pp. 458, 459):

> • • • We agree with that holding. The first section of the act is limited in its inhibition of seizures of vessels and cargoes of the United States to ports of the United States and its possessions. The second section is *in pari materia*, and the same limitation must be implied in its construction. This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe*, 250 U. S. 246. It was intended to substitute this proceeding *in personam*, as the first section of the act expressly indicates, in lieu of the previous unlimited right of claimants to libel such vessels *in rem* in the ports of the United States and its possessions. Congress had no power, however, to enact im-

> munity from seizure in respect of such vessels when in foreign ports, and therefore the embarrassment of seizures was to be mitigated in another way, *i. e.*, by claiming immunity on international grounds and, if that failed, by stipulation or bond in the name of the United States. The provisions of the seventh section confirm the construction by which provisions of the second section are limited in their application to vessels within the jurisdiction of the United States.
>
> A number of important questions as to the construction of this statute have arisen in other cases, and the argument before us has taken a wide range. Those questions do not require decision here, and we do not decide them. All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit *in personam* against the United States as a substitute for a libel *in rem* when the United States vessel is not in a port of the United States or of one of her possessions.

In *James Shewan & Sons, Inc.*, v. *United States*, — U. S. —, decided November 17, 1924, the narrow question presented was whether Section 2 of the Act permitted a libel *in rem* to be filed against the United States where the vessel charged with liability at the time the libel was filed was taken from active service and placed in the laid-up fleet. Mr. Chief Justice Taft, speaking for the court, said:

> • • • This Act was enacted chiefly for the purpose of relieving the United States from obstruction to its commercial

traffic by the seizure of merchant vessels owned by it or under its control and was intended to substitute an equivalent remedy against the United States *in personam* for the right *in rem* against the vessel, which the Act of 1916 had permitted. *Blamberg Bros.* v. *United States*, 260 U. S. 452, 458, 459. We do not find anything in the Act of 1916 which would prevent its liberal construction to enable one who had repaired a vessel engaged solely as a merchant vessel for the United States from proceeding against that vessel *in rem* under the Act of 1916, even though after the repairs had been made upon her as a commercial vessel, she was subsequently laid up, if she had not then acquired character as a public vessel. * * *

In view of the purpose of Congress in the Act of 1920 merely to substitute an action *in rem* for an action *in personam*, the natural construction would be one which, *ceteris paribus*, would measure the extent of the right to sue the United States *in personam* by that which had been granted in the Act of 1916 to sue *in rem* its offending or responsible vessel. The date of natural importance in fixing the liability *in rem* would seem to be that of the event out of which the liability grew. The date of the suit would be important only in the application of a statute of limitation or a change in character of the vessel from that of a merchant vessel to public vessel, or possibly some kind of a change in ownership or the happening of some other circumstance after the event which would exempt the offending vessel if privately owned

from seizure under the rules of admiralty law.

This opinion denied a narrow construction to the clauses of the act in question and applied a more reasonable and liberal interpretation, in accord with the equitable purposes of Congress.

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